In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1147

ROBERT HALPIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1967. A petition for rehearing was denied on February 13, 1967. The petition for a writ of certiorari was filed on March 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether statements made by co-conspirators during the pendency of the conspiracy were made in furtherance of the conspiracy.

258-855—67

STATEMENT

After a trial by jury, petitioner was convicted in the United States District Court for the Eastern District of Wisconsin of causing the interstate transportation of fraudulently acquired merchandise in violation of 18 U.S.C. 2314 (Count 20) and of conspiring to cause the interstate transportation and concealment of such merchandise in violation of 18 U.S.C. 371, 2314, and 2315 (Count 21). On September 17, 1965, he was sentenced to imprisonment for three years on each count, the terms to run concurrently. The court of appeals affirmed the convictions (Pet. App. A).

The indictment described a scheme fraudulently to acquire merchandise in Milwaukee, Wisconsin, and then ship it to "fences" in Detroit and Cleveland for distribution. Petitioner, Jacob Shubow and Ruth McGuigan were charged with the substantive count of causing the transportation to Detroit (A. 2).[1] Joined in the conspiracy count were petitioner, James Bishop, Frank Verville, Ruth McGuigan, Irving Lichterman, Daniel Wigodski and Jacob Shubow (A. 3).[2]

[1] "A." refers to the appellant's appendix in the court below, on file with the Clerk of this Court.

[2] Initially, petitioner, Bishop and Verville pleaded guilty. The charges against McGuigan were dismissed. Lichterman, Shubow and Wigodski were convicted after not-guilty pleas. Subsequently, the convictions of Lichterman, Shubow and Wigodski were vacated because of error at trial, and the court of appeals permitted petitioner, Bishop and Verville to withdraw their pleas of guilty. Bishop and Verville were re-tried and convicted. Verville appealed and the court of appeals reversed. *United States* v. *Verville*, 355 F. 2d 527 (C.A. 7). Petitioner was granted a severance in the instant case, and was tried alone.

The evidence in support of the government's charges (the sufficiency of which is not challenged here) may be briefly summarized. With respect to the operations in Milwaukee, the government's evidence consisted primarily of the testimony of convicted co-conspirator Bishop. He testified that in early June 1958, Verville asked him to manage a direct sales business which would buy merchandise in Milwaukee and resell elsewhere throughout the country at less than the invoice price. Verville said that he would finance the operation (A. 7–8). Bishop and Verville decided to open a store in Milwaukee as a "front for this so-called business" (A. 8), and in July 1958, they purchased Scanlon's Radio and Music Store (herein called Scanlon) for $3500 (A. 9). Bishop and Verville then sent postcards to various suppliers of merchandise inviting offers. When Bishop received replies from the suppliers, he forwarded them to Verville, who, in turn, ordered merchandise (A. 9–10). The merchandise received was stored in a warehouse which Bishop and Verville had rented (A. 10–11). Although Bishop did not personally operate the warehouse, he observed merchandise being shipped from it to various parts of the country. Verville told him that the merchandise was being shipped to Cleveland and Detroit (A. 11–12).

Bishop further testified that he had seen petitioner at the Milwaukee warehouse on several occasions and that Verville had told him that he (Verville) was taking in petitioner as a third partner (A. 12–13). Verville also told Bishop that defendants Wigodski,

Lichterman, and Shubow had organized the scheme, that Wigodski and Lichterman were fences in Cleveland, and that Shubow was a fence in Detroit (A. 14–15).

With respect to the business' operation in Detroit, the government's evidence consisted primarily of testimony of Ludwig Rohe, a bookkeeper for co-conspirator Jacob Shubow, who, together with his wife, was the owner of Rich-Mor Sales Company in Detroit (A. 24). Rohe testified that in September 1958, he overheard a conversation among petitioner (who Rohe then knew as Bob Grunther), Verville and Shubow concerning the shipments of merchandise from Scanlon (A. 24–25). At Shubow's direction, Rohe leased, under the name of Bob Grunther, the Pollard warehouse in which boxes of merchandise bearing Scanlon's label were stored (A. 25). Shubow also operated warehouses on Prairie Street and Grand River Street in Detroit, in which other Scanlon merchandise was stored (A. 25, 33–34). Rohe testified that Shubow operated on a cash basis with regard to resales of Scanlon merchandise, and that when Shubow received payments from his buyers, he would reimburse Scanlon with checks drafted to cash which were given to either Verville or petitioner (A. 26, 27). Two such checks were deposited in a Detroit finance and investment company and were credited to petitioner's account (A. 27, 38–40). Rohe also testified that petitioner, on occasion, had picked up invoices relating to Scanlon merchandise at Shubow's office (A. 27).

Other evidence showed that the lease for Shubow's Grand River warehouse was signed by petitioner, who

had introduced himself as Shubow's partner (A. 30); that petitioner had hired employees to work at the Grand River and Prairie warehouses (A. 33–34); and that petitioner was a partner with Verville in the latter's Wyn-Oak Appliance Company in Berwyn, Illinois (A. 8, 45).

ARGUMENT

Petitioner claims that the trial court committed reversible error in admitting testimony as to two statements made by co-conspirators: (a) Bishop's testimony that Verville said he was taking in petitioner as a third partner (A. 12–13); and (b) Rohe's testimony that his employer, Shubow, told him that checks, drawn to cash as payment to Scanlon, were to be given to either petitioner or Verville (A. 26, 27). Petitioner does not contend that the statements were not made during the pendency of the conspiracy, nor does he contend that there was an insufficient showing that the declarants and he were members of the common conspiracy. Petitioner's only claim is that these statements were not made in furtherance of the conspiracy and were thus inadmissible as to him. The contention is without merit. It was in furtherance of the conspiracy that Bishop should know of petitioner's participation in the scheme. Bishop was thus made aware not only of the full extent of the scheme, but also of the plan by which to continue the scheme's existence—i.e., by taking in petitioner as a third partner. Shubow's statement to Rohe was also made in furtherance of the conspiracy. Although Shubow insisted on conducting his operations on a cash basis in order to conceal the nature of the scheme, he never-

theless found it necessary to have an accurate account kept of his receipts and disbursements. Shubow's declaration (which was corroborated by other proof showing that two such checks drafted to cash were credited to petitioner's account) clearly was made to enable Rohe to perform these bookkeeping functions.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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